88-1219

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. _____

THOMAS BIELICKI AND JACQUELINE BIELICKI,
Petitioners

VS.

PAKISTAN NATIONAL SHIPPING CORPORATION

AND

EMPIRE STEVEDORING COMPANY, LTD.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE UNITED STATES DISTRICT COURT HAD JURISDICTION OVER EMPIRE, WHERE EMPIRE CREATED THE HAZARD, THE BLOCKING OF THE ACCESS LADDER, BY THE MANNER IT STOWED THE CARGO IN MONTREAL, WHERE IT KNEW OR SHOULD HAVE KNOWN OF THE RISK IT CREATED, AND KNEW OR SHOULD HAVE KNOWN THAT THE VESSEL WOULD STOP TO LOAD ADDITIONAL GOODS AT AN AMERICAN PORT, SUCH AS PHILADELPHIA, WHERE THE RISK CREATED WOULD LIKELY CAUSE INJURY, SUCH AS OCCURRED HERE; WHETHER THERE IS AN ALTERNATE BASIS FOR IN PERSONAM JURISDICTION, WHERE EMPIRE HAD A "PRINCIPLE BRANCH OFFICE" IN DULUTH, MINNESOTA, SHOWING SUFFICIENT CONTACTS WITH THE UNITED STATES, AS A WHOLE.

II. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THERE WAS NO EVIDENCE THAT THE VESSEL OWNER KNEW OF THE HAZARD CREATED BY THE BLOCKAGE OF THE ACCESS LADDER TO THE LOWER HOLD BY THE FOREIGN

STEVEDORE, WHERE THE SHIP'S LOG REFLECTS SUCH KNOWLEDGE, AND IN LIMITING THE VESSEL'S DUTY AS TO DANGEROUS CONDITIONS EXISTING ON THE VESSEL PRIOR TO AND AT THE TIME THE VESSEL IS TURNED OVER TO THE PRESENT STEVEDORE, SOLELY BECAUSE THE CONDITION WAS CREATED BY THE ORIGINAL LOADING STEVEDORE IN A FOREIGN PORT.

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PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Decision, without Opinion, of the Court of Appeals is reported at 851 F.2d 1463 (3rd Cir. 1988). A copy of the Opinion, and the Order denying Reconsideration, and the Opinions and Orders of the District Court of October 22, 1987 and February 29, 1988, are contained in the Appendix, at A-1 through A-38.

JURISDICTION

a) The date of the Judgment sought to be reviewed is October 6, 1988, the denial of the Petition for Rehearing.

b) This Honorable Court has jurisdiction under 28 U.S.C. §1254(1)

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS WHICH THE CASE INVOLVES

Jurisdiction is predicated on 42 Pa. C.S.A. §5322(a)(4), which provides that there shall be jurisdiction over "persons", which includes corporations (42 Pa. C.S.A. 5301), "as to a cause of action.....arising from such person:

.....

4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth."

The jurisdiction arising under §(a)(4), above, is limited to the cause of action wherein the injury occurred in the Commonwealth.

42 Pa. C.S.A. §5322(b) further provides:

> "In addition to the provisions of subsection (a), the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States."

33 U.S.C.A. §905(b), provides:

> **(b) Negligence of vessel**
> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.
> .....
> The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

STATEMENT OF THE CASE

Plaintiff THOMAS BIELICKI, (Petitioner herein, along with his wife), suffered injury while working as a longshoreman loading cargo on board the M/V MALAKAND, a vessel, in the Port of Philadelphia, PA on May 24, 1985. Plaintiff filed suit against Respondent EMPIRE STEVEDORING COMPANY,[1] a Canadian business entity, with its principal place of business in Montreal, Quebec, Canada, where it loaded cargo aboard the said vessel, and which also has a business office in Duluth, Minnesota, and PAKISTAN NATIONAL SHIPPING CORPORATION,[2] a wholly owned Corporation of the Government of Pakistan, which was the owner and operator of the vessel on which the injury occurred. Petitioner JACQUELINE BIELICKI is seeking damages for loss of consortium and support.

EMPIRE contested Jurisdiction in the

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[1]EMPIRE STEVEDORING CO., LTD. is hereinafter referred to as "EMPIRE'.

[2]PAKISTAN NATIONAL SHIPPING CORPORATION is hereinafter referred to as "PAKISTAN" or vessel owner.

District Court, averring that it had insufficient contacts with the Eastern District of Pennsylvania to constitutionally allow acquisition of Jurisdiction over it. Petitioner urged that Jurisdiction did exist, based on EMPIRE'S creating the risk of harm, by blocking the access ladder when it loaded the vessel in Montreal, with knowledge that the vessel would likely stop at American Ports, such as Philadelphia.

At the conclusion of trial, the Motion to Dismiss for Lack of Jurisdiction was Granted. See Appendix pp. A-23-A-25, A-28, A-32-A35. The Court of Appeals affirmed the finding of no Jurisdiction - Appendix pp. A-5-A-12.

With respect to PAKISTAN, the Trial Court heard the case without a jury, as PAKISTAN is an instrumentality of a foreign state. After hearing the evidence, the Trial Court held that PAKISTAN did not breach any duty of care owed by it, and was not negligent and that there was no evidence it knew of the hazard created by

EMPIRE in its stowage. See Appendix, pp. A-25-A-27, A-35-36.

On Appeal, the Judgment of the District Court, with respect to both EMPIRE and PAKISTAN was affirmed. See Appendix pp. A-1-A-15.

JURISDICTION OF THE DISTRICT COURT

The District Court had Subject Matter Jurisdiction pursuant to 33 U.S.C. §905, and the provisions for Admiralty Jurisdiction under the United States Constitution. There is Federal Question Jurisdiction under 28 U.S.C. §1331, and Diversity Jurisdiction under 28 U.S.C. §1332 against both PAKISTAN and EMPIRE.

There is in Personam Jurisdiction over PAKISTAN, by virtue of its vessel having stopped in Philadelphia for loading, during which the accident which injured Petitioner occurred.

There is in Personam Jurisdiction over EMPIRE by virtue of EMPIRE having created the hazardous condition by the way in which it blocked the access ladder to the hold in loading goods in Montreal, which it knew would create an unreasonable risk to whomever required access to the hold, to load additional goods, or to unload. EMPIRE knew, or should have known, that the vessel would stop at an American port, such as Philadelphia, prior to

arrival at its ultimate destination, so that it is subject to Jurisdiction under the Pennsylvania Long Arm Statute, 42 Pa. C.S.A. §§5301 and 5322(b).

ARGUMENT

I. THE UNITED STATES DISTRICT COURT HAD JURISDICTION OVER EMPIRE, WHERE EMPIRE CREATED THE HAZARD, THE BLOCKING OF THE ACCESS LADDER, BY THE MANNER IT STOWED THE CARGO IN MONTREAL, WHERE IT KNEW OR SHOULD HAVE KNOWN OF THE RISK IT CREATED, AND KNEW OR SHOULD HAVE KNOWN THAT THE VESSEL WOULD STOP TO LOAD ADDITIONAL GOODS AT AN AMERICAN PORT, SUCH AS PHILADELPHIA, WHERE THE RISK CREATED WOULD LIKELY CAUSE INJURY, SUCH AS OCCURRED HERE; THERE IS AN ALTERNATE BASIS FOR IN PERSONAM JURISDICTION, WHERE EMPIRE HAD A "PRINCIPLE BRANCH OFFICE" IN DULUTH, MINNESOTA, SHOWING SUFFICIENT CONTACTS WITH THE UNITED STATES, AS A WHOLE.

Jurisdiction exists over EMPIRE by virtue of its negligence in loading the vessel in Montreal, creating a dangerous condition which would pose a substantial risk to all longshoremen who would be required to enter the

hold, coupled with its knowledge that the vessel would be stopping for additional cargo, and the reasonable inference that it would stop at American ports after leaving Montreal for such purposes. The negligence of EMPIRE caused injury in the Commonwealth of Pennsylvania.

In Hedrick v. Daiko Shoji Co., Ltd., 715 F.2d 1355 (9th Cir. 1983), the Court of Appeals for the Ninth Circuit, addressed the personal injury claim of a longshoreman claiming jurisdiction over the foreign manufacturer of a wire-rope splice used on board the vessel he was working, stating:[3]

"In determining whether a court has personal jurisdiction over a defendant, we use a two-step analysis. Raffaele, 707 F.2d at 396. We first apply the forum state's long arm statute and then consider whether its application comports with due process requirements.

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[3]The Pennsylvania Long Arm Statute, 42 Pa. C.S.A. §§5301, 5322(a)(4), and 5322(b), provide literal jurisdiction, the tortious conduct outside the Commonwealth causing harm within the Commonwealth, and provide jurisdiction up to the full extent permitted by the Constitution. See Kenny v. Alexson Equipment Co., 495 Pa. 107, 117, 432 A.2d 974 (1981); and Action Industries, Inc. v. Wiedman, 236 Pa. Super. 447, 346 A.2d 798 (1975) (Knowledge of foreign tort-feasor that injury may occur in Pennsylvania is not a prerequisite).

Taubler v. Giraud, 655 F.2d 991, 993 (9th CIr. 1981). As Oregon's long-arm statute, Or.R.Civ.P. 4, confers jurisdiction "to the outer limits" of due process,.....We need consider only the second step here. See Raffaele, 707 F.2d at 396. We must decide whether Daiko's contacts with Oregon justify jurisdiction over Daiko for the purposes of this action. See Internat. Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945); Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977). The minimal contacts requirements of constitutional due process are met when: (1) a nonresident defendant performs some act by which it avails itself of the benefits and protections of the forum's laws; (2) the claim arises out of or results from the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable. Raffaele, 707 F.2d at 397; Data Disc, 557 F.2d at 1287." 715 F.2d at 1357.

In Hedrick, supra, the Ninth Circuit noted:

"Daiko performed a forum-related act when it produced a splice that it knew was destined for ocean-going vessels serving United States ports, including those of Oregon. Hedrick's claim resulted from the forum-related act." 715 F.2d at 1357.

Accord, Peters v. Titan Navigation Co., 1985 AMC 2249 (D. Ore. 1985).

The Third Circuit has decided the same question contrary to the rule adopted by the Ninth Circuit in Hedrick, supra. See DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3rd Cir. 1981). The District Court for the

Eastern District of Pennsylvania, however, has upheld jurisdiction over a foreign stevedore where the foreign stevedore clearly knows that the vessel is bound for Philadelphia. Muller v. Tempura Shipping Co., Ltd., 629 F.Supp. 1024 (E.D. Pa. 1986); Friend vs.Internor Trade, Inc., C.A. No. 86-4073 (E.D. Pa., Memorandum of 3/13/87, Ludwig, J.).

The Ninth Circuit, in Hedrick, supra; Raffaele v. Compagnie Generale Maritime, 707 F.2d 395 (9th Cir. 1983) (Jurisdiction over West German terminal operator who packed cargo container upheld in suit by Oregon longshoreman injured in unloading the same), and the District Court in Peters, supra, upheld jurisdiction, under standards which would mandate jurisdiction in the instant case, and held that the standard set by this Honorable Court in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) were met in the above cases.

The Third Circuit, in DeJames v. Magnificence Carriers, Inc., supra,

interpreted World-Wide Volkswagen Corp., supra, more restrictively and denied jurisdiction, making for a conflict in the circuit courts as to the interpretation of World-Wide Volkswagen.[4] (The distinction under cases in the Third Circuit would be EMPIRE'S actual knowledge of whether the vessel is coming to Philadelphia).

Under the Ninth Circuit cases of Hedrick and Peters, jurisdiction exists over EMPIRE. Under the Third Circuit case of DeJames, there is no jurisdiction over EMPIRE.

Certiorari should be granted by this Honorable Court to resolve the conflicting jurisdictional analyses of the Ninth Circuit

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[4]The Second Circuit would probably follow the Third Circuit view. See Mascuzzio v. Pakistan National Shipping Corp., 1985 AMC 2332 (S.D. N.Y. 1984), aff'd, per curiam, 755 F.2d 914 (2d Cir. 1985). See Asahi Metal Ind. v. Superior Court of California, 107 S.Ct. 1026, 480 U.S. 102, 94 L. Ed.2d 92 (1987), Brennan, J, concurring in part and in the judgment, 107 S.Ct. at 1036, f.n. 1 and 2; State of North Carolina v. Alexander & Alexander Services, 685 F.Supp. 114, 116 (E.D. N.C. 1988); O'Neill v. Picillo, 682 F.Supp. 706, 713-715, f.n. 1 (D. R.I. 1988); King v. McAllister Bros., Inc., 659 F.Supp. 39, 44 (S.D. Ala. 1987).

Court of Appeals and the Third Circuit Court of Appeals.

There is also another basis for jurisdiction. The instant suit involves a maritime tort, under the admiralty power of the federal courts. See East River Steamship Corp. v. Delval Turbine, Inc., 1985 AMC 913 (3rd Cir. 1985).

In Trans-Asiatic Oil Ltd. v. Apex Oil Co., 743 F.2d 956 (1st Cir. 1984), the Court of Appeals held one of the functions envisioned in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), the minimum forum contact, did not apply to admiralty jurisdiction.

A number of federal courts have adopted the thesis that because minimum fifth amendment due process standards apply in federal question cases, that minimum contacts should be measured against the United States rather than the state in which the district court is sitting, this theory being sometimes referred to as the "aggregate contacts" theory. Federal Trade Commission v. Jim Walter Corp., 651 F.2d 251,

256 (5th Cir. 1981); Texas Trading v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1981), cert. denied, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed2d 301 (1982); Clement v. Pehar, 575 F.Supp. 436, 438 (N.D.Ga. 1983); Cryomedics, Inc. v. Spembly, Ltd., 397 F.Supp. 287, 290 (D.Conn. 1975); Holt v. Klosters Rederi A/S, 355 F.Supp. 354, 357 (W.D. Mich. 1973); Edward J. Moriarty & Co., 289 F.Supp. 381, 390 (S.D. Ohio 1967); see also Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1237-39 (6th Cir.), cert. denied 454 U.S. 893, 102 S.Ct. 388, 70 L.Ed.2d 207 (1981).

The Third Circuit rejected the "aggregate contacts" theory in DeJames, supra. See also King v. McAllister Bros., Inc., supra. In State of North Carolina v. Alexander & Alexander Services, 685 F.Supp. 114 (E.D. N.C. 1988), the District Court recognized that the "question of whether national contacts may sustain personal jurisdiction over a foreign defendant" was "unresolved". 685 F.Supp. at 116. But see Lana Mora, Inc. v. SS Woermann

Ulanga, 672 F.Supp. 125, 128-129 (S.D. N.Y. 1987).

This Honorable Court should grant certiorari to resolve that "unresolved" question.[5]

WHEREFORE, Petitioners pray that this Honorable Court grant this Petition for Writ of Certiorari, for the reasons stated herein, and upon hearing the matter, determine that there is jurisdiction over EMPIRE.

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[5]The national contacts of EMPIRE include their operation of a business office in Duluth, Minnesota. This would be a sufficient jurisdictional basis under the "aggregate contacts" theory. It should be noted that suit was filed in the District Court in Minnesota, CA No. 4-88-431. EMPIRE filed a motion to dismiss, which is still pending. The parties have agreed to stay the Minnesota proceeding, pending the determination of this Petition for Writ of Certiorari.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THERE WAS NO EVIDENCE THAT THE VESSEL OWNER KNEW OR SHOULD HAVE KNOWN OF THE HAZARDOUS CONDITION CREATED BY THE BLOCKAGE OF THE ACCESS LADDER TO THE LOWER HOLD BY THE FOREIGN STEVEDORE, WHERE THE SHIP'S LOG REFLECTS SUCH KNOWLEDGE, AND IN LIMITING THE VESSEL'S DUTY AS TO DANGEROUS CONDITIONS EXISTING ON THE VESSEL PRIOR TO AND AT THE TIME THE VESSEL IS TURNED OVER TO THE PRESENT STEVEDORE, SOLELY BECAUSE THE CONDITION WAS CREATED BY THE ORIGINAL LOADING STEVEDORE IN A FOREIGN PORT.

Under 33 U.S.C.A. §905(b), "in the event of injury to a person covered . . . caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party . . ."

The seminal case interpreting §905(b) is Scindia Steam Navigation Co. v. Santos, 451 U.S. 156, 101 S.Ct. 1614 (1981). That duty,

even post-Scindia, may be satisfied where the vessel and its equipment are turned over to the oncoming stevedore in good and safe condition. Bates v. Merritt Seafood, Inc., 663 F.Supp. 915 (D. S.C. 1987). That duty is breached where a hazardous condition was created prior to the vessel being turned over to the stevedore.[6] Bates v. Merritt Seafood, Inc., supra; Keele v. Oxford Shipping Co., Ltd., 553 F.Supp. 994 (D. Ore. 1983), aff'd, 735 F.2d 1370 (9th Cir.); Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1981); Ollestad v. Greenville S.S. Corp., 738 F.2d 1049 (9th Cir. 1984). Ollestad

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[6]The Deck Log of the vessel reflects that in Montreal the vessel knew that access to the lower hold was restricted because of the stowage by EMPIRE. See Finding of Fact 7, Appendix p. A-14:

> "1935 Completed loading for the port and gang shifted to No. 1 to clear the cargo from the hatch access to L.H."

In the instant case, the defective and dangerous condition existed prior to the stevedore coming aboard; it was not something which arose out of the discharge or loading operation in Philadelphia. See Lieggi v. Maritime Co. of Philippines, M/V Philippine Rizal, 667 F.2d 324 (2d Cir. 1981); Thomas v. Plovidba, 653 F.Supp. 1300 (E.D. Wisc. 1987).

further recognized that the vessel would be liable for injury to a longshoreman for injuries caused by a hazardous condition created by the foreign stevedore in loading the vessel. See also Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), cert. den., 459 U.S. 967, amended, 702 F.2d 752 (1983); Mallard v. Aluminum Co. of Canada, 634 F.2d 236 (5th Cir. 1981);[7] Gill v. Hango Ship-Owners/AB, 682 F.2d 1070 (4th Cir. 1982).[8]

The vessel has the obligation to provide safe passageways, including access by ladders to the hold, and where that access is blocked, because of stowage, or because of a defective ladder, liability lies. See Matthews v. Ernst Russ S.S.Co., 603 F.2d 676 (7th Cir. 1979),

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[7]See also Stass v. American Commercial Lines, Inc., 720 F.2d 1049 (9th Cir. 1984); Theriot v. Bay Drilling Corp., 783 F.2d 527 (5th Cir. 1986); Clark v. Bothelho Shipping Corp., 784 F.2d 1563 (11th Cir. 1986).

[8]The Third Circuit Court of Appeals distinguished and/or rejected Gill, to the extent that Gill could be deemed to be in conflict with DeLoach v. Lloyd Brasileiro, 826 F.2d 1054, 1987 AMC 2290, 2997 (f.n. 1) (3rd Cir. 1987).

cert. den., 451 U.S. 975 (Vessel liable for defective ladder, even if it is open and obvious); Walker v. Blacksea S.S. Co., 637 F.2d 287 (5th Cir. 1981), reh. den., 642 F.2d 1210 (Ladder was obstructed by lashing wire strung across it from cargo stow).

The "duty" under §905(b) extends to "negligence", i.e., violation of a duty, to the same extent that a land-based owner of a premises may violate a duty to an independent contractor who comes on the premises to perform work. See Matthews v. Ernst Russ Steamship, Co., supra; Rother v. Interstate Ocean Transport Co., E.D.Pa. C.A. No. 77-2792, (Slip Opinion, Judge Shapiro, 5/24/82, at pp. 11-13); Woodruff v. United States, 710 F.2d 128 (4th Cir. 1983).[9]

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[9]That duty, as the owner of a premises, may be to see that the premises conforms to OSHA regulations. See Teal v. E.I. DuPont DeNemours & Co., 728 F.2d 799 (6th Cir. 1984). A vessel owner may also have an obligation to see that OSHA regulations are complied with, and not merely the stevedore-employer. See Woodruff v. United States, 710 F.2d 128 (4th Cir. 1983); Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1980)(OSHA regulations may be "binding on the shipowner

The Third Circuit Court of Appeals in Derr v. Kawasaki Kisen K.K., 835 F.2d 490 (3rd Cir. 1987), cert. den., 108 S.Ct. 1733 (1988), limited Scindia to only a "narrow duty.....to intervene to make repairs" which did not "extend beyond defective conditions with respect to the ship, its equipment, and gear." 835 F.2d at 496. The Derr Court rejected Turner v. Japan Lines, Ltd., supra, and the related cases from the Fifth and Eleventh Circuits.[10]

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where he knew or should have known of the safety regulations.")

The substantive OSHA regulations are, as follows:

1. 29 C.F.R. §1915.46, provides: "Section 1915.46 Access to cargo spaces and confined spaces. (a) Cargo spaces. (1) There shall be at least one safe and accessible ladder in any cargo space which employees must enter.

.....

(4) When cargo is stowed within 4 inches of the back of ladder rungs, the ladder shall be deemed "unsafe" for the purpose of this section."

2. 29 C.F.R. §1917.51(b) provides: "Adequate aisles and passageways shall be maintained....."

[10]See footnote 7, supra.

Petitioner urges that under the case law the vessel did have a legal responsibility to see that the cargo was properly stowed. See Lacaze v. Olendorff, 526 F.2d 1213 (5th Cir. 1976); Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1973). If the cargo is not safely and properly stowed, so that it creates an unreasonable dangerous risk to the longshoremen unloading the cargo, then the failure to safely and properly stow the cargo may be considered negligence by the shipowner. Rich v. United States Lines, 596 F.2d 541 (3rd Cir. 1979).[11]

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[11]Under the provisions of 46 U.S.C. §1303(2), "the carrier shall properly and carefully load,handle, stow, carry, keep and care for, and discharge the goods carried." See also 46 U.S.C. §1303. The duty to carefully load and stow the goods is nondelegable. Nicimen Co. v. M.V. Farland, 462 F.2d 319 (3rd Cir. 1972); See American Independent Oil Co. v. M.S. Alkaid, 289 F.Supp. 329 (D.N.Y. 1967); Freedman & Slaker, Inc., M.V. Tofero, Holdings, Ltd. v. Great Circle Shipping, Inc., 433 F.Supp. 1067 (D. Ala. 1977).

The breach of any duty created by statute or regulation which results in injury provides the basis for liability where the violation is the proximate cause of the injury. Kernan v. American Dredging Co., 355 U.S. 426 (1958); Clevenger v. Star Fish & Oyster Co., Inc., 325 F.2d 397 (5th

Accordingly, this Honorable Court should grant Certiorari, and hear this case on the merits, for the following reasons:

1. The findings of no evidence of negligence by the vessel is inconsistent with the ship's log which conclusively shows that the vessel knew the stowage in Montreal blocked access to the lower hold;[12]

2. The blocked access ladder is a condition of the vessel for which the vessel is responsible;

Cir. 1963). Thus, where there is a statutory duty imposed on the vessel under 46 U.S.C. §1303 to see that cargo is properly stowed, a violation of that statutory duty impels a finding of negligence in the failure to comply with said duty by the vessel, and liability is predicated under Kernan v. American Dredging Co., supra, in addition to negligence under Ollestad, supra. The violation of the statute supplies the negligence requirement of 33 U.S.C. §905(b).

[12]The court's finding of the log entry as a fact, coupled with its conclusions that PAKISTAN had no duty, show that this was a conclusion of law and not of fact, and not entitled to application of the "clearly erroneous" rule. See Gediman v. Anheuser-Busch, Inc., 299 F.2d 537 (2d Cir. 1962); Universal Minerals, Inc. v. C.A. Hughes Co., 669 F.2d 98 (3rd Cir. 1981) (Plenary review of application of legal precepts to historical facts).

3. Where a dangerous condition is created aboard the vessel by an improper stowage at the last port, the vessel is liable where it fails to correct the condition or take other steps to avoid the danger;

4. The Third Circuit Court of Appeals restrictively interpreted 33 U.S.C. §905(b) in a manner inconsistent with Congress' intent, and the interpretation of this Honorable Court in Scindia Steam Navigation Co. v. Santos, supra;

5. The decision of the Court of Appeals for the Third Circuit in this case is contrary to the decisions of the Courts of Appeal for the Fourth, Fifth, Ninth and Eleventh Circuits, with respect to the general duty as to the creation of a dangerous condition by the stowage by a foreign stevedore (See Ollestad v. Greenville S.S. Corp., supra, and cases cited at f.n. 7, supra), and the duty imposed on a land based employer in possession of a premises (Teal v. E.I. DuPont DeNemours & Co., supra, as applied in longshore cases (Woodruff v. United

States, supra, and the duty to keep the ship's passages safe (Matthews v. Ernst Russ Steamship Co., supra), and the application of Kernan v. American Dredging Co., supra, to 46 U.S.C. §1303, and the OSHA regulations, and as the "positive law" requirements of a duty mandated by this Honorable Court in Scindia Steam Navigation Co. v. Santos, supra.

WHEREFORE, Petitioners pray that this Honorable Court grant this Petition for Writ of Certiorari.

CONCLUSION

WHEREFORE, Petitioner prays that this Honorable Court grant the Petition for Writ of Certiorari on the questions presented.

ALOYSIUS J. STAUD

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*Member of the Bar of the Supreme Court of the United States.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 1989, , three true and correct copies of the Petition for Writ of Certiorari were served on each Respondent by depositing the same with the United States Post Office, First Class Mail, Postage Prepaid, addressed to

TIMOTHY ABEEL, ESQUIRE
956 Public Ledger Building
600 Chestnut Street
Philadelphia, PA 19106
Attorney for PAKISTAN NATIONAL SHIPPING CORP.
Respondent

THOMAS SEUS, ESQUIRE
1700 Atlantic Building
260 S. Broad Street
Philadelphia, PA 19102
Attorney for EMPIRE STEVEDORING CO., LTD.
Respondent

I further certify that all parties required to be served have been served.

Harvey Lee Anderson

HARVEY LEE ANDERSON
Attorney for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1203

THOMAS BIELICKI and JACQUELINE BIELICKI,
Appellants

vs.

PAKISTAN NATIONAL SHIPPING CORPORATION
and
EMPIRE STEVEDORING COMPANY, LTD.

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG HUTCHINSON, SCIRICA, and COWEN, Circuit Judges, and FISHER, District Judge.*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

October 6, 1988

_____
Circuit Judge

* Honorable Clarkson S. Fisher, as to panel rehearing only.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1203

BIELICKI, THOMAS and
BIELICKI, JACQUELINE, his wife
Appellants

vs.

PAKISTAN NATIONAL SHIPPING CORPORATION
EMPIRE STEVEDORING COMPANY, LTD.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 86-6175)
District Judge: Honorable Charles R. Weiner

Submitted Pursuant to Rule 12(6)
August 18, 1988

Before: STAPLETON and MANSMANN, Circuit Judges, and FISHER, District Judge.*

Filed August 26, 1988

MEMORANDUM OPINION OF THE COURT

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*Honorable Clarkson S. Fisher of the United States District Court for the District of New Jersey, sitting by designation.

MANSMANN, Circuit Judge.

Thomas Bielicki, a longshoreman employed by Northern Shipping Co., was injured while loading cargo aboard the M/V MALAKAND while the vessel was docked in the Port of Philadelphia, Pennsylvania. Bielicki claims that when he stepped on a rung of a makeshift ladder, a dunnage board protruding from the cargo, the board broke and caused him to fall to the deck below.

Bielicki filed a complaint against Pakistan National Shipping Company, the owner of the vessel, and Empire Stevedoring Company, which loaded the cargo at the MALAKAND'S port-of-call in Montreal, Quebec. Bielicki alleged that Pakistan's breach of duty to insure the safety of the vessel and Empire's negligence in loading the cargo caused his injuries.

Because Pakistan is an instrumentality of a foreign state, the case was tried without a jury pursuant to 28 U.S.C. §1602. At the conclusion of the trial, the district court

dismissed the complaint against Empire under Fed. R. Civ. p. 12(b)(2) for want of personal jurisdiction. The court determined that service of process under the Pennsylvania long-arm statute, 42 Pa. C.S.A. §5322, did not reach Empire since the stevedoring company was not doing business in the Commonwealth of Pennsylvania and did not have sufficient minimum contacts with Pennsylvania to support an exercise of personal jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

As to Pakistan, the district court initially determined that the vessel owner was entitled to and did rely upon the stevedore to inspect and supervise the cargo loading operation. The court found, however, that the evidence failed to demonstrate that Pakistan knew or should have known of the alleged hazard caused by the loading of the cargo and thereby concluded that Pakistan did not breach the statutory duty of due care owed to Bielicki. Accordingly, the

district court entered judgment on the merits in favor of Pakistan.

Bielicki filed motions for amendment of judgment, a new trial, judgment n.o.v., and objections to the findings of fact and conclusions of law. All motions were denied by the district court and Bielicki appealed.

I. Bielicki v. Empire

Bielicki argues that the court improperly dismissed Empire from the suit on three grounds. First, Bielicki claims that Empire had the requisite minimum contacts with Pennsylvania to trigger application of the state's long-arm statute; second, since the matter fell under federal admiralty subject matter jurisdiction, aggregate contacts with the United States rather than minimum contracts with the forum state should be the controlling standard for determining exercise of personal jurisdiction; and, third, in the alternative, the action should have been transferred to the

district court sitting in Minnesota where, Bielicki asserts, Empire has a principal place of business.[1]

Fed. R. Civ. P. 4(e) provides for service upon a party not found within a state by the manner provided by that state's statute. The Pennsylvania Long-Arm Statute, codified at 42 Pa. C.S.A. §5322 (1978), is intended to extend as far as is constitutionally permissible and, for purposes of this case, would confer in personam jurisdiction over Empire if the company was transacting business in Pennsylvania or caused a tortious injury in the Commonwealth. 42 Pa. C.S.A. §§5322(1), 5322(4).

For personal jurisdiction to attach, the defendant's forum related activities must pass minimum contacts analysis. The central focus of a jurisdictional inquiry is the relationship

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[1]Empire notes that Bielicki raises several bases for jurisdiction for the first time on appeal. Because jurisdictional issues are never waived, we will discuss the merits of each of these arguments.

between the defendant, the forum and the litigation. International Shoe, id. at 319. Most recently, the Supreme Court has stated that the "substantial connection" between the defendant and the forum state necessary for a finding of minimum contacts, see Burger King v. Rudzewicz, 471 U.S. 462, 475 (1985), must arise from an action of the defendant purposefully directed toward the forum state. Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102 (1987).

Bielicki has failed to set forth sufficient facts to demonstrate the minimum contacts to support personal jurisdiction over Empire. In sum, Bielicki has offered no facts for his assertion that Empire had a reasonable expectation that its activities would subject it to suit in Pennsylvania, which is the crucial test we set forth in DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3d Cir.), cert denied, 454 U.S. 1085 (1981). In DeJames, citing World-Wide Volkswagen Corp v.

Woodson, 444 U.S. 286, 297 (1980), we held that, "Standing alone, the fact that the defendant could foresee that its conduct might affect the forum state . . . is too attenuated to constitute a reasonable expectation . . . " that the defendant could be haled into court in a foreign jurisdiction. Id. at 285.

In this case, Empire loaded someone else's goods aboard the M/V MALAKAND while it was docked in Montreal. The vessel and its cargo were destined for Africa and Pakistan, but it made a stop in Philadelphia. Viewing the fact in a light most favorable to Bielicki, the record shows at best that some employees of Empire may have been aware that the vessel would load additional cargo at some subsequent port of call. Bielicki directs our attention to only one direct contact that Empire had with Pennsylvania; the vessel upon which Empire loaded the cargo was eventually docked in Philadelphia when Bielicki was injured. This contact is not sufficient to support the

exercise of personal jurisdiction over Empire; a contrary finding would run in contravention to the traditional notions of fair play and substantial justice as set forth in Asahi Metal Industry, 480 U.S. 102 at 111.

Bielicki next argues that personal jurisdiction can be established because the particular action involves a maritime tort, invoking the admiralty jurisdiction of the federal courts. Bielicki urges us to adopt the thesis that because minimum fifth amendment due process standards apply in federal question cases, the inquiry concerning the requisite minimum contacts should not be confined to the state in which the particular district court is sitting, but rather, should be measured against all of Empire's activity in the United States. We rejected the "aggregate contacts" theory in Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 297 (3d Cir. 1985), because of the absence of a federal statute authorizing the exercise of personal jurisdiction.

Noting the rationale of Daetwyler, we conclude that in the absence of a provision in the admiralty law authorizing nationwide service of process, the district court's power to exercise in personam jurisdiction is limited by Fed. R. Civ. P. 4(e), which authorizes application of the forum state's long arm statute. We have already determined that personal jurisdiction cannot be obtained over Empire under the appropriate Pennsylvania statute. Thus, no personal jurisdiction exists despite the presence of an independent federal question.

As a third attempt to assert personal jurisdiction over Empire, Bielicki suggests that the district court should transfer this action under the authority of 28 U.S.C. §§1404(a) and 1406 to the federal district court sitting in Minnesota.

At the outset we note that these sections refer to changes of venue, not to transfer for lack of jurisdiction. As Empire points out, if

transfer of this matter was in fact appropriate, the governing statute would be 28 U.S.C. §1631, regarding transfer to cure for want of jurisdiction if the transferring court deems transfer to be in the interest of justice.

Empire failed to file a motion for a transfer before the district court and, indeed, has failed to set forth a sufficient evidentiary basis for its transfer request now. In light of this we cannot say that the district court erred in not transferring this case. Since sufficient facts have not been alleged before us, we decline to remand for further consideration by the district court.[2] Additionally, we find that the issue of transfer has become moot, since Bielicki has in fact pursued this action by filing suit in Minnesota within the requisite statute of

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[2]Whether Empire's operation in Minnesota would suffice to confer jurisdiction under Minnesota's long arm statute would require fact-finding not within our jurisdictional province.

limitations.

We therefore conclude that the complaint against Empire was properly dismissed for want of personal jurisdiction.

II. Bielicki v. Pakistan

Bielicki further argues that the district court improperly entered judgment on the merits in favor of Pakistan. Bielicki's theory of recovery against Pakistan is that the shipowner knew or should have known of the hazardous condition created by Empire's cargo loading operation.

In 1972, Congress amended the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq., to eliminate a vessel's liability without fault. 33 U.S.C. §905(b) (amended 1972). After the amendments, the Supreme Court established a specific standard of due care owed by a vessel to stevedore employees in Scindia Steam Navigation Co., Ltd. v. De Los

Santos, 451 U.S. 156 (1981):

> We are of the view that absent contract provision, positive law or custom to the contrary - none of which has been cited to us in this case - the shipowner has no general duty by way of supervision to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore.

Id. at 172.

We most recently rejected an argument attempting to impose vicarious liability on shipowners for negligence of stevedores in Derr v. Kawaski Kisen K.K., 835 F.2d 490 (3d Cir. 1987), cert. denied, 108 S. Ct. 1733 (1988). In Derr, we held that Scindia compels a holding that the shipowner has no duty to supervise or inspect cargo loaded or unloaded by stevedores and may not be held liable for injuries arising out of the stevedore's failure to perform his job properly. Id. at 493.

The district court here decided that, under Scindia, Pakistan had no duty to correct the conditions which developed during the loading

and unloading services conducted by the independent stevedore because it did not have knowledge of these conditions.

Bielicki argues that the district court erred when it found no evidence that Pakistan knew or should have known of the purportedly dangerous condition created by the stowage of the cargo. On appeal, we review those findings of fact under the clearly erroneous standard. Since Bielicki had not persuaded us that a mistake has been made in the district court's assessment of the facts, the findings will not be disturbed by us on review. Applying the law of the amendments to the longshore and Harbor Workers Compensation Act, as interpreted by Scindia and Derr, we see no legal basis for Bielicki's attempt of recovery against Pakistan.

We also reject Bielicki's argument that the positive law exception carved out in Scindia, 451 U.S. at 172, is applicable. The OSHA Regulations for Longshoring, 29 C.F.R. §1918 et

seq., requiring safe and accessible ladders for longshoremen, apply to the employer of the longshoremen. Scindia, 451 U.S. at 177; Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979). Bielicki was employed by Northern Shipping Co., not Pakistan - this point is without dispute.

We likewise find the positive law of the Carriage of Goods by Sea Act, 46 U.S.C. §1300 et seq., inapplicable since the act governs contracts for the carriage of goods, not personal injury actions.

We conclude that Pakistan did not breach its duty of reasonable care owed to Bielicki. The judgment of the district court entered in Pakistan's favor will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS BIELICKI and JACQUELINE BIELICKI	:	
VS.	:	
	:	C.A. NO. 86-6175
PAKISTAN NATIONAL SHIPPING CORPORATION and EMPIRE STEVEDORING COMPANY, LTD.	:	

MEMORANDUM OPINION AND ORDER

WEINER, J. OCTOBER 22, 1987

Plaintiffs, Thomas and Jacqueline Bielicki filed the complaint in the instant matter on October 21, 1986. The complaint alleged that Thomas Bielicki, while employed as a longshoreman loading cargo aboard the M/V Malakand in Philadelphia, sustained bodily injury as a result of the negligence of defendants Pakistan National Shipping Corporation (PNSC), the owner of the ship, and Empire Stevedoring Company, Ltd. (Empire), the stevedore employed by PNSC at the Malakand's prior port of call in Montreal, Quebec. The complaint also alleges a count by the wife-plaintiff for loss of consortium. Prior to

trial, Empire filed a motion for dismissal, pursuant to Fed.R.Civ. P. 12(b)(2), alleging a lack of in personam jurisdiction. Empire's motion was denied without prejudice and with leave to renew at the time of trial. Empire has so renewed its motion, which will be decided herein. Also prior to trial, PNSC filed a motion for summary judgment, pursuant to Fed.R.Civ. P. 56. As genuine issues of material fact were in dispute, this motion was denied. The case was tried to the court sitting without a jury, PNSC being an instrumentality of a foreign state which precluded trial by jury. See 28 U.S.C. §1602 et seq. The court's findings of fact and conclusions of law follow.

FINDINGS OF FACT PERTAINING TO PLAINTIFF'S ACCIDENT

1. Plaintiff, Thomas Bielicki, is a longshoreman employed by the Northern Shipping Company (Northern) in Philadelphia,

Pennsylvania. He has been so employed for eleven years as a "holdman" in the longshore gang of Mickey Bielec, a gang boss at Northern.

2. PNSC is the owner of the M/V Malakand, a general cargo vessel. PNSC is an instrumentality of a foreign state, Pakistan.

3. Empire is an incorporated stevedoring company organized and existing pursuant to the laws of Quebec, Canada.

4. The M/V Malakand berthed at Empire's marine terminal in Montreal, Canada on May 5, 1985 and Empire, an independent contractor, began cargo operations aboard the vessel on May 6, 1985 at 0800 hours with two gangs of longshoremen. During the vessel's call at Montreal, EMpire loaded 4,501.8 metric tons of general cargo aboard the M/V Malakand from May 6 to May 14, 1985 in hatches 1, 2 and 4.

5. On May 8, 9, and 11, 1985 Empire loaded cases of parts, a heavy lift containing an atomic reactor and aluminum ingots in the No. 1 hatch tween deck. Twenty-four (24) skids of

aluminum ingots were loaded by Empire in the forward part of the No. 1. hatch tween deck.

6. On May 14, 1985 Empire finished the loading of cargo aboard the vessel and before the M/V Malakand was secured for sea, an Empire longshore gang entered the No. 1 hatch tween deck at 1935 hours to clear the lower hold hatch access..

7. The Deck Log of the M/V Malakand reflects the following entry on May 14, 1985 at 1935 hours:

> 1935 Completed loading for the port and gang shifted to #No. 1 to clear the cargo from the hatch access to L.H.

8. The M/V Malakand docked at Northern's marine terminal in Philadelphia, Pennsylvania on May 21, 1985. Northern, an experienced stevedore, commenced loading operations aboard the vessel at 1330 hours on May 21, 1985 with three gangs of longshoremen in hatches 1, 3, and 4.

9. Northern employed a Stevedore Superintendent, a Ship Foreman, and a Hatch

Foreman for each hatch to conduct, supervise, and monitor the loading of cargo aboard the M/V Malakand.

10. At the No. 1 hatch, the longshoremen worked under the direct supervision and control of their Hatch Foreman, Mickey Bielec, a longshoreman who has worked on the Philadelphia waterfront for about 20 years and who has been a hatch foreman at Northern for about 10 years.

11. Bielec's longshore gang consisted of nineteen (19) men, ten (10) of these longshoremen were holdmen who worked in the No. 1 hatch lower hold. Plaintiff, Thomas Bielicki, was one of the holdmen.

12. At 1300 hours on May 21, Northern commenced loading cargo aboard the M/V Malakand without any complaints, or requests for remedial action, to the vessel. Bielec's longshore gang worked in the No. 1 hatch lower hold for 6 1/2 hours on May 21 and 10 hours on May 22, but there was no work on May 23 due to rain.

13. On May 24, the third day of cargo operations aboard the M/V Malakand, Bielicki was injured as he was entering the No. 1 hatch. He testified that after he had descended the No. 1 hatch forward tween deck ladder, he stepped off the ladder and stood on aluminum cargo, at a height about 5' above the access to the lower hold. Then, Bielicki stepped on a piece of dunnage which protruded from the cargo about 2' above the deck. The dunnage board broke, causing him to fall to the deck.

14. At said time and place, it was necessary for plaintiff to use the escape hatch ladders located at the forward end of the No. 1 hatch in order to do his assigned job. The said ladder ran from the top deck to the tween deck where there was an offset of approximately 2 feet and then from the tween deck to the lower hold. There was lashed cargo (the aluminum) stowed around the ladder reaching from the top deck to the lower deck of No. 1 hold. The stowage of this cargo prevented the

longshoremen from using the ladder for the distance of five feet running from the tween deck to the top of the cargo. The ladder was the only available entrance to the lower hold of No. 1 hatch. Plaintiff was using the dunnage boards as a makeshift ladder to descend from the top of the cargo to the deck.

15. Bielicki observed the dunnage before he stepped on the board, but he saw no apparent defect and he did not know the reason for the breakage. He testified that he, and the other holdmen, had stepped on the same dunnage during the preceding days of work.

16. There was no evidence which identified the party, or parties, who placed the dunnage boards in the cargo in the No. 1 hatch tween deck aboard the M/V Malakand on which plaintiff and his co-workers stepped when entering the No. 1 hatch tween deck or when the dunnage was placed in the cargo prior to plaintiff's accident.

17. According to Joseph T. McGowan, the

expert called by Pakistan National Shipping Corporation, if longshoremen employed by Empire Stevedoring in Montreal had placed dunnage in the stow to stabilize the tiers of skids of aluminum, they would have placed the dunnage at the corners of the skids or between the tiers of cargo to stabilize the cargo.

18. The evidence showed that the dunnage boards upon which plaintiff stepped to get to the skin of the No. 1 hatch tween deck were placed randomly in spaces between the cargo and, therefore, served no purpose in the cargo stow.

FINDINGS OF FACT PERTAINING TO THIS COURT'S JURISDICTION OVER EMPIRE

19. Empire is a Canadian Corporation.

20. Empire is not registered to do business in the Commonwealth of Pennsylvania.

21. Empire has no place of business in Pennsylvania.

22. Empire has no assets in the

Commonwealth of Pennsylvania.

23. Empire owns no real or personal property in Pennsylvania.

24. Empire has had no contracts with any companies or businesses in the Commonwealth of Pennsylvania.

25. No cargo was loaded by Empire in the last five (5) years for discharge in the Commonwealth of Pennsylvania nor was any cargo discharged by Empire Stevedoring in Montreal which had been loaded aboard vessels in the Commonwealth of Pennsylvania in the last five (5) years.

26. Empire Stevedoring does not solicit any business in the Commonwealth of Pennsylvania.

27. The Stowage Plan created by Empire which was completed at the conclusion of loading in Montreal did not show that the vessel would call at Philadelphia.

28. The only contact which Empire has with the Commonwealth of Pennsylvania is that the M/V Malakand which was loaded by Empire on or

about May 6 through 14, 1985 subsequently called at Philadelphia and plaintiff was injured while working aboard the vessel resulting in the instant lawsuit.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this matter pursuant to 28 U.S.C. §§1330 and 1332.

2. This court lacks personal jurisdiction over defendant Empire Stevedoring Company. Empire was not and is not "doing business" in the Commonwealth of Pennsylvania. 42 Pa. C.S.A. §5322. Further, Empire lacks sufficient minimum contacts with the Commonwealth of Pennsylvania to meet the jurisdictional requirements dictated by International Shoe Co. v. Washington, 326 U.S. 310 (1945). Therefore, only the duty owed to plaintiff by defendant PNSC need be determined.

3. PNSC's duties to plaintiff are controlled by the Longshoreman and Harborworkers Compensation Act, 33 U.S.C.

§905(b). (The Act).

4. The United States Supreme Court has determined that it would be inconsistent with the Act to impose a duty upon a shipowner to discover and correct dangerous conditions which develop during loading or unloading services conducted by an independent stevedoring company. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 169 (1980). Congressional intent in passing the Act was to foreclose no-fault liability on the shipowner based on a theories of unseaworthiness or nondelegable duty. The shipowner, within limits, is entitled to rely on the stevedore and owes no duty to the longshoremen to inspect or supervise the cargo operations. Id at 172.

5. While the vessel has operational control over itself and its equipment, the independent stevedore has operational control over the handling of the cargo and its stow aboard the vessel.

6. Where the vessel owner has actual

knowledge of an unreasonable hazard in the stowage of cargo, it will have an affirmative duty to inform the stevedore of the hazard, especially if the hazard is latent. Robertson v. Tokai Shosen K.K., 655 F.Supp. 152, 154-155 (1987).

7. Where, however, as here, the vessel owner relied upon the loading stevedore in Montreal, and there is no evidence that the vessel owner knew or had any reason to know of a hazard allegedly presented by the means of stowage of the prior stevedore, the vessel owner has breached no duty of reasonable care owed to the longshoremen and is not negligent. Id at 155.

8. Judgment ont he merits will, therefore, be entered in favor of the vessel owner, PNSC.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS BIELICKI and JACQUELINE BIELICKI	:	
VS.	:	C.A. NO. 86-6175
PAKISTAN NATIONAL SHIPPING CORPORATION and EMPIRE STEVEDORING COMPANY, LTD.	:	

OCTOBER 22, 1987

ORDER

The motion of defendant Empire Stevedoring Company pursuant to Fed.R.Civ.P. 12(b)(2) for dismissal for lack of personal jurisdiction is GRANTED.

The complaint as to defendant Empire Stevedoring Company, Ltd. is DISMISSED.

Judgment on the merits is entered in favor of defendant Pakistan National Shipping Corporation and against plaintiffs Thomas Bielicki and Jacqueline Bielicki.

IT IS SO ORDERED.

CHARLES R. WEINER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS BIELICKI and JACQUELINE BIELICKI	:	
VS.	:	C.A. NO. 86-6175
PAKISTAN NATIONAL SHIPPING COMPANY	:	

MEMORANDUM OPINION AND ORDER

WEINER, J. FEBRUARY 29, 1988

Plaintiffs, Thomas and Jacqueline Bielicki filed a complaint on October 21, 1986 alleging that Thomas Bielicki sustained bodily injury, while employed as a longshoreman loading cargo aboard the M/V Malakand in Philadelphia, as a result of defendants' negligence. The defendants in the instant matter are Pakistan National Shipping Corporation ("PNSC"), the owner of the ship and Empire Stevedoring Company, Ltd. ("Empire"), the stevedore employed by PNSC at the Malakand's prior port of call in Montreal, Quebec.[1] This court's

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[1]The complaint also alleged a count by the wife-plaintiff for loss of consortium.

decision on October 22, 1987 dismissed the complaint as to defendant Empire after granting Empire's motion to dismiss for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2). Finally, judgment on the merits was entered in favor of defendant Pakistan National Shipping Company and against plaintiffs Thomas Bielicki and Jacqueline Bielicki. Presently before the court are the plaintiffs' motion for amendment of judgment, new trial, judgment n.o.v. and objections to the court's findings of fact and conclusions of law.[2]

Plaintiffs have moved for judgment n.o.v. pursuant to Fed.R.Civ.P. 50, or, in the alternative, for a new trial pursuant to Fed.R.Civ.P. 59. The standard for granting a judgment notwithstanding the verdict is the same as that governing a directed verdict. Overpeck v. Chicago Pneumatic Tool Co., 634

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[2]As this matter was tried to the court sitting without a jury, plaintiffs' motion will be construed as one to amend the court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 59(a)(2).

F.Supp. 638, 639 (E.D. Pa. 1986). In situations where the trier of fact is the jury, the court must determine after giving the party who secured the jury verdict the benefit of all reasonable inferences that can be drawn from the evidence, without weighing the credibility of the evidence, whether reasonable minds could only come to one conclusion. Id. A district court may grant a new trial if required to prevent injustice or to correct a verdict that was against the weight of the evidence. American Bearing Co., Inc. v. Litton Industries, Inc., 729 F.2d 943, 948 (1984), cert. denied 105 S.Ct. 178; Thomas v. E.J. Korvette, Inc., 476 F.2d 471, 474-75 (3d Cir. 1974); 6A j. Moore, Moore's Federal Practice, ¶59.08[5], at 59-140, 59-152 (2d ed. 1982). "The authority to grant a new trial, moreover, is confined almost entirely to the exercise of discretion on the part of the trial court," Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36, 101 S.Ct. 188, 191 (1980) (per

curiam) and will only be disturbed if the district court abused that discretion.

The case sub judice was dried to the court sitting without a jury, PNSC being an instrumentality of a foreign state which precluded trial by jury. See 28 U.S.C. §1602 et seq. A motion for a new trial in a non-jury case should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons. McConney v. Great Atlantic & Pacific Tea Co., 455 F.Supp. 1143, 1150 (E.D. Pa. 1978); Wright & Miller, Federal Practice and Procedure, Civil §2804.

This court made previous finding of fact pertaining to our jurisdiction over Empire:

19. Empire is a Canadian Corporation.

20. Empire is not registered to do business in the Commonwealth of Pennsylvania.

21. Empire has no place of business in Pennsylvania.

22. Empire has no assets in the Commonwealth of Pennsylvania.

23. Empire owns no real of personal

property in Pennsylvania.

24. Empire has had no contracts with any companies or businesses in the Commonwealth of Pennsylvania.

25. No cargo was loaded by Empire in the last five (5) years for discharge in the Commonwealth of Pennsylvania nor was any cargo discharged by Empire Stevedoring in Montreal which had been loaded aboard vessels in the Commonwealth of Pennsylvania in the last five (5) years.

26. Empire Stevedoring does not solicit any business in the Commonwealth of Pennsylvania.

27. The Stowage Plan created by Empire which was completed at the conclusion of loading in Montreal did not show that the vessel would call at Philadelphia.

28. The only contact which Empire has with the Commonwealth of Pennsylvania is that the M/V Malakand which was loaded by Empire on or about May 6 through 14, 1985 subsequently called at Philadelphia and plaintiff was injured while working aboard the vessel resulting in the instant lawsuit.

Plaintiffs contend that finding No. 28 should be omitted. Plaintiffs claim that this court does have personal jurisdiction over Empire. Plaintiffs propose that (1) due to Empire's negligence resulting in injury in the Commonwealth, (2) knowledge that the vessel would call at American ports, and (3) knowledge

that its negligence would expose the loading longshoreman to an unreasonable risk of harm at each port of call, that this court has personal jurisdiction over Empire. Plaintiffs further claim their proposed findings should be included. Generally, these findings state that Empire violated its duty to stow cargo in a manner creating a safe condition and the violation of this duty caused the accident and injury incurred by plaintiff Thomas Bielicki.

Having thoroughly reviewed the record, we have no cause to question our previous findings of fact. There was ample evidence presented at trial that Empire has had no minimal contacts with the Commonwealth of Pennsylvania. This court concluded, pursuant to 42 Pa. C.S.A. §5322, that we lack personal jurisdiction over Empire because it was not and is not "doing business" in the Commonwealth. The only contact, mentioned above which Empire had with the plaintiff was insufficient to meet the jurisdictional requirements dictated by

International Shoe Co. v. Washington, 326 U.S. 310 (1945). Without jurisdiction over Empire, the merits of the plaintiffs' proposed findings in relation to Empire need not be discussed.

This court made previous findings of fact pertaining to plaintiff's accident. The court's findings were that plaintiff was a longshoreman employed by the Northern Shipping Company (Northern) when he was injured during cargo operations at Northern's marine terminal in Philadelphia, Pennsylvania. Plaintiff stepped on a piece of dunnage which protruded from the cargo about 2 feet above the deck and the board broke, causing him to fall to the deck. There was no evidence which identified the party, or parties, who placed the dunnage boards in the cargo on which plaintiff stepped or when the dunnage was placed in the cargo prior to plaintiff's accident.

In this court's conclusions of law we stated that because of the Longshoreman and Harborworkers Compensation Act, 33 U.S.C.

§905(b) (the Act), which controls the shipowner's duty to longshoremen such as plaintiff, the shipowner, within limits, is entitled to rely on the stevedore and owes no duty to the longshoremen to inspect or supervise the cargo operations. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 172 (1980). Furthermore, this court concluded that the independent stevedore has operational control over the handling of the cargo and its stow aboard the vessel, and where, as in the case sub judice there is no evidence that the vessel owner knew or had any reason to know of a hazard allegedly presented by the means of stowage of the prior stevedore, the vessel owner has breached no duty of reasonable care to the longshoremen and is not negligent. Robertson v. Tokai Shosen K.K., 655 F.Supp. 152, 155 (1987).

Because the law is clear that a motion for a new trial in a non-jury case should be based upon manifest error of law or mistake of fact,

and a judgment should not be set aside except for substantial reasons, we cannot grant a new trial in this case. The findings of fact and conclusions of law are supported by the evidence and must be upheld. For these reasons, the plaintiffs' motion must be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS BIELICKI and JACQUELINE BIELICKI	:	
VS.	:	C.A. NO. 86-6175
PAKISTAN NATIONAL SHIPPING COMPANY	:	

FEBRUARY 29, 1988

ORDER

The motion of plaintiffs, Thomas and Jacqueline Bielicki for amendment of judgment, new trial, judgment n.o.v. and objections to the court's findings of fact and conclusions of law is DENIED.

IT IS SO ORDERED.

CHARLES R. WEINER

(2)

FEB 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 1219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS BIELICKI and JACQUELINE BIELICKI,
Petitioners

vs.

PAKISTAN NATIONAL SHIPPING CORPORATION
and
EMPIRE STEVEDORING COMPANY, LTD.,
Respondents

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT EMPIRE STEVEDORING COMPANY, LTD.

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30pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER THIS HONORABLE COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE:

(1) THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA AND THE AFFIRMANCE OF THAT DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ARE IN ACCORD WITH THIS HONORABLE COURT'S DECISION IN *ASAHI METAL INDUSTRY CO., LTD. V. SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY;*

(2) THERE IS NO REAL CONFLICT BETWEEN THE COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT PRESENTED BY THE FACTS OF THE INSTANT CASE; AND

(3) THE UNRESOLVED QUESTION OF WHETHER PERSONAL JURISDICTION OVER A FOREIGN DEFENDANT MAY BE BASED ON THE AGGREGATE OF NATIONAL CONTACTS, RATHER THAN ON THE CONTACTS BETWEEN THE DEFENDANT AND THE STATE IN WHICH THE FEDERAL COURT SITS, MAY ONLY BE RECTIFIED BY CONGRESSIONAL AUTHORIZATION OF NATIONWIDE SERVICE OF PROCESS AND THERE IS NO SUCH STATUTE TO BE CONSTRUED BY THIS HONORABLE COURT.

LIST OF RELATED COMPANIES

Empire Stevedoring Co., Ltd., is a privately-held Canadian corporation. Its parent company, Chodos Investments, Ltd., is likewise privately-held by Canadian citizens. Empire Stevedoring Co., Ltd., has one wholly-owned subsidiary, Empire Stevedoring Co., Inc.

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COUNTERSTATEMENT OF THE CASE

The Petitioner, THOMAS BIELICKI, was allegedly injured while loading cargo aboard the M/V MALAKAND while the vessel was docked in the port of Philadelphia, Pennsylvania. Bielicki filed a Complaint against PAKISTAN NATIONAL SHIPPING CORPORATION (hereinafter PAKISTAN), the owner of the vessel, and EMPIRE STEVEDORING CO., LTD., (hereinafter EMPIRE), the stevedore which loaded certain cargo aboard the M/V MALAKAND in Montreal, Quebec. Bielicki alleged that PAKISTAN's breach of duty to insure the safety of the vessel and EMPIRE's negligence in loading the cargo caused his injuries. Respondent EMPIRE herein addresses only Issue I of Petitioner's Petition for Writ of Certiorari because Issue II concerns only Respondent Pakistan National Shipping Corporation.

At the conclusion of the trial, the District Court for the Eastern District of Pennsylvania granted EMPIRE's Motion under Fed. R. Civ. P. 12(b)(2) to dismiss for lack of personal jurisdiction. The court determined that service of process under the Pennsylvania long-arm statute, 42 Pa. C.S.A. §5322, did not reach EMPIRE since the stevedoring company was not doing business in the Commonwealth of Pennsylvania and did not have sufficient minimum contacts with Pennsylvania to support the exercise of personal jurisdiction. *See*, Petitioner's Petition for Writ of Certiorari, Appendix p. A-25.

On appeal, the Court of Appeals for the Third Circuit held that Bielicki failed to set forth sufficient facts to demonstrate the minimum contacts necessary to support personal jurisdiction over EMPIRE. The Court stated that Bielicki offered no facts supporting his assertion that EMPIRE had a reasonable expectation that its activities would subject it to suit in Pennsylvania. *See*, Petitioner's Petition for Writ of Certiorari, Appendix p. A-7. Accordingly, the judgment of the District Court dismissing the

complaint against EMPIRE for lack of personal jurisdiction was affirmed by the Court of Appeals for the Third Circuit. *See*, Petitioner's Petition for Writ of Certiorari, Appendix p. A-12.

ARGUMENT

I. THE UNITED STATES SUPREME COURT SHOULD NOT GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA AND THE AFFIRMANCE OF THAT DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ARE IN ACCORD WITH THE UNITED STATES SUPREME COURT DECISION IN *ASAHI METAL INDUSTRY CO., LTD. V. SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY.*

Respondent EMPIRE herein addresses only Issue I of Petitioner's Petition for Writ of Certiorari because Issue II concerns only Respondent Pakistan National Shipping Corporation, and respectfully submits that this Honorable Court should deny the Petition for Writ of Certiorari. United States Supreme Court Rule 17.1(c) provides for Supreme Court review on Writ of Certiorari when a Federal Court of Appeals ". . . has decided a federal question in a way in conflict with applicable decisions of this Court." However, the United States Court of Appeals for the Third Circuit held in favor of Respondent EMPIRE in accord with this Honorable Court's decision in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County,* 480 U.S. 102 (1987). Therefore, the precedent set in *Asahi Metal Industry* was followed by the Court of Appeals for the Third Circuit and this precludes review on Writ of Certiorari by this Honorable Court.

The Petitioners argue that, "[j]urisdiction exists over EMPIRE by virtue of its negligence in loading the vessel in Montreal, creating a dangerous condition which would pose a substantial risk to all longshoremen who would be required to enter the hold, coupled with its *knowledge* that the vessel would be stopping for additional cargo, and the *reasonable inference* that it would stop at American ports after leaving Montreal for such purposes." (emphasis added) (Petitioners' Petition for Writ of Certiorari, p. 11-12). However, the United States Court of Appeals for the Third Circuit held in the instant case, "[i]n sum, Bielicki has offered no facts for his assertion that Empire had a reasonable expectation that its activities would subject it to suit in Pennsylvania, which is the crucial test we set forth in *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981)." *Bielicki v. Pakistan National Shipping Corp. and Empire Stevedoring Co., Ltd.*, No. 88-1203 (3d Cir. Memorandum of 8/26/88, Mansmann, J.) (Petition for Writ of Certiorari, p. A-7)

This Honorable Court addressed the question of:

> . . . whether the mere awareness on the part of a foreign defendant that the component it manufactured, sold, and delivered outside the United States would reach the forum state in the stream of commerce constitutes 'minimum contacts' between the defendant and the forum state such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice' ". *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 105 (1987).

This Honorable Court, in holding that the exercise of personal jurisdiction over Asahi (a Japanese corporation) by the Superior Court of California exceeded the limits of Due Process, stated:

> The "substantial connection," *Burger King*, 471 U.S., at 475; *McGee*, 355 U.S. at 223, between the defendant and the forum state necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed to the forum State. Burger King, supra.* 471 U.S., at 476; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984). The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state. Additional conduct of the Defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state. But, a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State. (emphasis in original).

Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102, 112 (1987).

The Petitioners in the instant case argue an issue which was raised and decided by the United States Supreme Court in *Asahi Metal Industry*. Both the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit concluded that Bielicki did not set forth sufficient facts to demonstrate minimum contacts with the forum to support the exercise of personal jurisdiction over EMPIRE. The Court of Appeals for the Third Circuit stated that:

> In this case, Empire loaded someone else's goods aboard the M/V MALAKAND while it was docked in Montreal. The vessel and its cargo were destined for Africa and Pakistan, but it made a stop in Philadelphia. Viewing the fact in a light most favorable to Bielicki, the record shows at best that some employees of Empire may have been aware that the vessel would load additional cargo at some subsequent

> port of call. Bielicki directs our attention to only one direct contact that Empire had with Pennsylvania; the vessel upon which Empire loaded the cargo was eventually docked in Philadelphia when Bielicki was injured. This contact is not sufficient to support the exercise of personal jurisdiction over Empire; a contrary finding would run in contravention to the traditional notions of fair play and substantial justice as set forth in *Asahi Metal Industry*, 480 U.S. 102 at 111.

Bielicki v. Pakistan National Shipping Corp., No. 88-1203, Petitioner's Petition for Writ of Certiorari, Appendix pp. A-8, A-9.

Therefore, this Honorable Court should deny the Petition for Writ of Certiorari because the Court of Appeals for the Third Circuit decision does not conflict with the holding in *Asahi Metal Industry.*

II. THE UNITED STATES SUPREME COURT SHOULD NOT GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THERE IS NO REAL CONFLICT BETWEEN THE COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT PRESENTED BY THE FACTS OF THE INSTANT CASE, AND ACCORDINGLY NO BASIS FOR UNITED STATES SUPREME COURT JURISDICTION EXISTS.

United States Supreme Court Rule 17.1(a) provides for Supreme Court review on Writ of Certiorari when ". . . a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. . ." Petitioners assert that certiorari should be granted by this Honorable Court to resolve the conflicting jurisdictional analyses of the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Third Circuit on the matter of minimum contacts requirements necessary to assert personal jurisdiction over a foreign

Defendant. Respondent EMPIRE submits that the instant case is distinguishable from the Ninth Circuit cases and would be decided consistently whether in the Third or Ninth Circuits. Therefore, there is no real conflict between the Circuits and accordingly no basis for United States Supreme Court jurisdiction exists.

Petitioners argue that jurisdiction over EMPIRE would exist under the Ninth Circuit case of *Hedrick v. Daiko Shoji Co., Ltd.*, 715 F.2d 1355 (9th Cir., 1983). In *Hedrick*, the Court affirmed the District Court's exercise of personal jurisdiction over a defendant who performed a forum-related act by producing a splice that it *knew* was destined for ocean-going vessels serving United States ports. The Court stated that, "[t]he splice caused an injury to Hedrick in a port that was within the expected service area of Daiko's customers. . . . The probability that the part sold to an ocean carrier will be used in a foreign port is not fortuitous. It is certain." *Id.* at 1358.

Petitioners also cite the decision in *Peters v. Titan Navigation Co.*, 1985 A.M.C. 2249 (D. Ore. 1985), where the Court exercised jurisdiction over a defendant who allegedly was negligent in installing the vessel's hydraulic system during conversion, which resulted in injury to the plaintiff. However, the Court held that, "[i]t was foreseeable that a dry bulk carrier, registered as an American ship, would visit American ports . . . It is reasonable to believe that the defendants would 'reasonably anticipate being haled into court there.' " *Id.* at 2255.

The Courts in *Hedrick* and *Peters*, although pointing out the foreseeability of defendants being haled into Court in the applicable forum, also rely on the certainty of the risk created by defendants. However, both of those cases involved a products liability situation. In *Hedrick*, the defendants spliced a wire pendant that failed, causing injury to the plaintiff. Defendant supplied a defective product which it knew would enter the stream of foreign commerce. In

Peters, although defendant was the negligent installer of a product, that negligent installation travelled with the vessel permanently, until it eventually caused injury on board the vessel.

This products liability/stream of commerce analysis is inapplicable in the instant case. The stevedoring activities of EMPIRE constitute a provision of services rather than the introduction of goods into a world market. The United States District Court for the Eastern District of Pennsylvania has previously addressed the products liability/provision of services distinction as follows:

> . . . while it is quite reasonable from both a due process and policy standpoint to subject a non-resident manufacturer, importer or distributor to jurisdiction wherever its products may cause harm, since to do so encourages those with a substantial interest in a product to be responsible for its safety, nevertheless, this justification is absent in the case of a freight forwarder, who has no interest in the product other than to perform the purely ministerial task of arranging for its movement from one location to another.

Ward v. Baltimore Stevedoring Co., 437 F.Supp. 941, 944 (E.D. Pa. 1977).

Petitioners also cite the Court of Appeals for the Ninth Circuit decision in *Raffaele v. Compagnie Generale Maritime S.A.*, 707 F.2d 395 (9th Cir. 1983), which is also distinguishable from the instant case. In *Raffaele*, the Court asserted personal jurisdiction over a defendant in Oregon because the Court held that the defendant purposefully availed itself of the benefits and protections of Oregon's law by previously loading ninety-four containers destined for Oregon.

The case law in the Third Circuit is very clear as to the level of knowledge necessary to assert a defendant's reasonable expectation of being haled before a Court in the forum state, sufficient to sustain personal jurisdiction over that

defendant. In *DeJames v. Magnificence Carriers Inc.*, 654 F.2d 280 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981), the Court of Appeals for the Third Circuit held that the benefit the defendant Japanese Shipyard derived from the ability of the vessel it had converted to dock in New Jersey was insufficient to assert personal jurisdiction over that Japanese corporation in a longshoreman's suit for injuries sustained aboard the vessel. In discussing the requisite minimum contacts for asserting personal jurisdiction the Court stated that, "[s]tanding alone, the fact that the defendant could foresee that its conduct might affect the forum state, or that its product might find its way into the forum state, is too attenuated to constitute such a 'reasonable expectation' ". *DeJames*, 654 F.2d at 284. The Court further held that:

> . . . initially we must focus on the defendant's conduct to determine whether the nature of this conduct can be said to have put the defendant on notice that it may be called to defend its action in the forum state. We do not believe that the conversion work performed by Hitachi in Japan constitutes this kind of conduct. It is true that Hitachi could have foreseen that a ship of this size was capable of transporting cars to any port in the world. However, the Supreme Court put to rest the notion in *World-Wide Volkswagen* that this kind of foreseeability alone is a sufficient basis for personal jurisdiction under the due process clause.

DeJames, 654 F.2d at 286.

Petitioners cite two other cases which allegedly support the application of personal jurisdiction, both of which are distinguishable from the instant case. First, in *Muller v. Temura Shipping Company, Ltd.*, 629 F.Supp. 1024 (E.D. Pa. 1986),[1] the Court held that a British Stevedoring Com-

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1. It should be noted that the Court of Appeals for the Third Circuit never had the opportunity to consider the jurisdictional issue in *Muller* because the case was settled before trial and there was no appeal.

pany which loaded cargo on board a ship in a United Kingdom port *knowing* that the cargo would be unloaded in Philadelphia had sufficient minimum contacts with Pennsylvania to establish the District Court's personal jurisdiction over that defendant. The Court in *Muller* distinguished its case from the situation in *DeJames*, reinforcing the fact that purported foreseeability alone (as in the instant matter) is an insufficient basis for the exercise of personal jurisdiction over a foreign defendant. Further, the Court in *Muller* made the distinction that the defendant, in addition to knowing that the cargo it loaded would be discharged in Pennsylvania, had loaded Pennsylvania-bound ships on nineteen other occasions. Therefore, where the defendant in *Muller* arguably could have reasonably anticipated being haled into Court in Pennsylvania, EMPIRE in the instant case had no such knowledge upon which such expectation could be premised.

Friend v. Internor Trade Inc., C.A. No. 86-4073 (E.D. Pa. Memorandum of 3/13/87, Ludwig, J.) (available March 16, 1987, on LEXIS, Genfed library, Dist. file) can also be distinguished because the exercise of personal jurisdiction was found to be appropriate there because the defendant specifically knew on the occasion at issue and other occasions that it was loading cargo *to be discharged* in Pennsylvania.

The Petitioners' argument that the Court of Appeals for the Third and Ninth Circuits are in conflict as to the issue of minimum contact requirements is without merit in the case at hand. The facts in the instant case are distinguishable from the cases from the Court of Appeals for the Ninth Circuit in which personal jurisdiction over a foreign defendant was upheld, and are clearly consistent with the holding of the Court of Appeals for the Third Circuit in *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.) *cert. denied*, 454 U.S. 1085 (1981). Therefore, this Honorable Court should not grant the Petition for Writ of Cer-

tiorari because this case does not present facts showing a real conflict between the Court of Appeals for the Third and Ninth Circuits.

III. THE UNITED STATES SUPREME COURT SHOULD NOT GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE UNRESOLVED QUESTION OF WHETHER NATIONAL CONTACTS MAY SUSTAIN PERSONAL JURISDICTION OVER A FOREIGN DEFENDANT MAY ONLY BE RECTIFIED BY CONGRESSIONAL AUTHORIZATION OF NATIONWIDE SERVICE OF PROCESS AND THERE IS NO SUCH STATUTE TO BE CONSTRUED BY THIS HONORABLE COURT.

United States Supreme Court Rule 17.1(c) provides for Supreme Court review on Writ of Certiorari when ". . . a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court . . ." Petitioners argue that a number of federal courts have adopted the thesis that because minimum Fifth Amendment due process standards apply in federal question cases, that minimum contacts with the United States as a whole rather than the state in which the District Court is sitting should be considered.[2] Petitioners assert that since the instant suit involves a maritime tort under the admiralty power of the federal courts, this Honorable Court should grant certiorari to resolve the "unresolved" question of whether the aggregate of national contacts should be considered to support personal jurisdiction over a foreign defendant.

---

2. This theory is sometimes referred to as the "aggregate contacts" theory.

Petitioners cite two Circuit Court decisions in support of the "aggregate contacts" theory. The Court of Appeals for the Fifth Circuit, in *Federal Trade Commission v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981), held that the District Court had personal jurisdiction over a foreign corporation due to the fact that nationwide service of process was implicitly authorized under the Federal Trade Commission Act. In *Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), the Court of Appeals for the Second Circuit held that the relevant area in delineating contacts was the entire United States due to the fact that service was made under §1608 of the Foreign Sovereign Immunities Act.

As the Court of Appeals for the Third Circuit stated in the instant case:

> We rejected the "aggregate contacts" theory in *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 297 (3d Cir. 1985), because of the absence of a federal statute authorizing the exercise of personal jurisdiction.
>
> Noting the rationale of *Daetwyler*, we conclude that in the absence of a provision in the admiralty law authorizing nationwide service of process, the district court's power to exercise in personam jurisdiction is limited by Fed. R. Civ. P. 4(e), which authorizes application of the forum state's long arm statute. We have already determined that personal jurisdiction cannot be obtained over Empire under the appropriate Pennsylvania statute. Thus, no personal jurisdiction exists despite the presence of an independent federal question.

Bielicki v. Pakistan National Shipping, No. 88-1203 3d Cir., Petitioner's Petition for Writ of Certiorari, Appendix pp. A-9, A-10.

In *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 286 (3d Cir. 1981), the Court of Appeals for the Third Circuit held that since "Congress has not authorized nationwide service of process, a federal district court's power to

require a defendant to submit to its jurisdiction is limited by the Federal Rules of Civil Procedure, and through them by the long-arm rule of the state in which it sits." The Court went on to state that, "even in non-diversity cases, if service of process must be made pursuant to a state long-arm statute or rule of Court, the defendant's amenability to suit in federal district court is limited by that statute or rule." *Id.* at 283. Therefore, even under federal admiralty jurisdiction, EMPIRE must have the requisite minimum contacts with the forum state before being subject to personal jurisdiction.

The Court of Appeals for the Third Circuit in *DeJames* stated in dictum that:

> The anomaly of a federal court being limited by the requirements of the fourteenth amendment in a nondiversity case where service must be made pursuant to a state long-arm rule could be easily rectified by congressional authorization of nationwide service of process for admiralty cases. It is not within our province to create such authorization.

DeJames, 654 F.2d at 284.

The Court of Appeals for the Third Circuit reaffirmed the position in *DeJames* four years later by holding that because "in the absence of a governing federal statute, we have found no authority for exercising personal jurisdiction over Meyer on the basis of his contacts with states other than Pennsylvania, *we reject the national contacts theory* on which the district court predicated its jurisdiction." (emphasis added). *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 297 (3d Cir. 1985). The Court of Appeals for the Ninth Circuit, in declining to recognize the aggregate contacts theory, previously stated:

> If policy considerations do indeed dictate that an alien defendant's contacts with the entire United States should be aggregated, and if the Constitution does not forbid such a practice — at least where the plaintiff is suing in federal

> court on a federal cause of action, the Federal Rules should be amended to authorize such a practice. *Such a step is, however, not ours to take.* (emphasis added)

Wells Fargo & Company v. Wells Fargo Express Company, 556 F.2d 406, at 418 (9th Cir. 1977).

There is no federal statute under which personal jurisdiction is asserted to be construed in this case and accordingly the statement by this Honorable Court, in a footnote in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987), that "[w]e have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits (citations omitted) . . ." applies, and therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied because:

(1) the decision of the United States District Court for the Eastern District of Pennsylvania and the affirmance of that decision by the United States Court of Appeals for the Third Circuit are in accord with the United States Supreme Court decision in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*;

(2) there is no real conflict between the Court of Appeals for the Third Circuit and the Court of Appeals for the Ninth Circuit presented by the facts of the instant case; and

(3) the unresolved question of whether national contacts may sustain personal jurisdiction over a foreign defendant may only be rectified by Congressional authorization of nationwide service process and there is no such statute to be construed by this Honorable Court.

WHEREFORE, Respondent EMPIRE STEVEDORING COMPANY, LTD. prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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